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No. 03-358

In the Supreme Court of the United States

DEPARTMENT OF TRANSPORTATION, ET AL.,
PETITIONERS

v.

PUBLIC CITIZEN, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

JEFFREY A. ROSEN
General Counsel

PAUL M. GEIER
Assistant General Counsel for Litigation

PETER J. PLOCKI
Senior Trial Attorney

BRIGHAM A. MCCOWAN
Chief Counsel

MICHAEL J. FALK
Acting Assistant Chief Counsel
Federal Motor Carrier Safety Administration
Department of Transportation
Washington, D.C. 20590

JOHN K. VERONEAU
General Counsel
Office of the United States Trade Representative
Executive Office of the President
Washington, D.C. 20508

THEODORE B. OLSON
Solicitor General
Counsel of Record

THOMAS L. SANSONETTI
Assistant Attorney General

EDWIN S. KNEEDLER
THOMAS G. HUNGAR
Deputy Solicitors General

JEFFREY BOSSERT CLARK
Deputy Assistant Attorney General

AUSTIN C. SCHLICK
Assistant to the Solicitor General

JOHN L. SMELTZER
DAVID C. SHILTON
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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QUESTION PRESENTED

Whether a Presidential foreign affairs and foreign trade action that is otherwise exempt from environmental-review requirements under the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C), and the Clean Air Act, 42 U.S.C. 7506(c)(1), became subject to those requirements as a result of a rulemaking action concerning motor carrier safety by the federal agency charged with that responsibility.

PARTIES TO THE PROCEEDING

Petitioners are: United States Department of Transportation; Federal Motor Carrier Safety Administration (FMCSA); Annette M. Sandberg, as Administrator, FMCSA; and David Martin, as Western Field Administrator, FMCSA.

Respondents who were petitioners in the court of appeals below are: Public Citizen; Brotherhood of Teamsters, Auto and Truck Drivers, Local 70; California Labor Federation; California Trucking Association; Environmental Law Foundation; and International Brotherhood of Teamsters.

Respondents who were petitioners-intervenors in the court of appeals below are: Natural Resources Defense Council and Planning and Conservation League.

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BRIEF FOR THE PETITIONERS

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-52a) is reported at 316 F.3d 1002. The rulemaking decisions of the Federal Motor Carrier Safety Administration are published at 67 Fed. Reg. 12,702 (Pet. App. 53a-124a), 67 Fed. Reg. 12,758 (Pet. App. 125a- 202a), and 67 Fed. Reg. 12,776 (Pet. App., 203a-220a).

JURISDICTION

The judgment of the court of appeals was entered on January 16, 2003. A petition for rehearing was denied on April 10, 2003 (Pet. App. 221a-222a). On June 30, 2003, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including August 8, 2003. On July 28, 2003, Justice O'Connor further extended the time within which to file a petition for a writ of certiorari to and including September 8, 2003. The petition for a writ of certiorari was filed on that date and was granted on

December 15, 2003. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant statutory provisions and regulations are set out in an appendix to this brief. App., *infra*, 1a-20a.

STATEMENT

In November 2002, the President lifted a trade moratorium on certain operations by Mexican motor carriers in the United States. The President took that action pursuant to express congressional authorization, in furtherance of foreign policy and foreign trade objectives of the United States, and to comply with the ruling of an international arbitration panel under the North American Free Trade Agreement (NAFTA), Dec. 17, 1992, 32 I.L.M. 605 (1993). In anticipation of the President's action, the Federal Motor Carrier Safety Administration (FMCSA), which is the agency within the United States Department of Transportation (DOT) that has responsibility for motor carrier safety, issued regulations addressing the application of United States safety requirements to those Mexican motor carriers that would be permitted to operate in the United States once the moratorium was lifted.

In this case, the Ninth Circuit held that FMCSA, before promulgating its safety regulations, was required to review the environmental effects of the President's foreign trade determination under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(C), and the Clean Air Act (CAA), 42 U.S.C. 7506(c)(1). The court of appeals relied on respondents' contentions that the new cross-border operations by Mexican trucks that are permitted under the President's trade decision will have adverse air quality effects in the United States, and that those effects are attributable to FMCSA's safety rulemakings. The court concluded that FMCSA had to study that air quality issue before it could fulfill its separate statutory responsibility of establishing safety-related regulations governing the operations of Mexican motor carriers.

The court of appeals' decision is incorrect. The determination to allow cross-border operations by Mexican carriers was the result of the joint exercise by Congress and the President of their constitutional responsibilities for foreign trade and foreign relations, and was made in accordance with NAFTA obligations and pursuant to statutory provisions vesting trade authority directly in the President. NEPA and the CAA, by contrast, establish procedural requirements that guide subsidiary decision-making by federal agencies. Congress did not extend those requirements to the President, whose constitutional and statutory responsibilities demand greater flexibility, particularly in the areas of foreign relations and foreign trade that are at issue here.

In its safety rulemakings, moreover, FMCSA lacks the authority and expertise to pass upon the many factors—including relations with other Nations, compliance with international agreements such as NAFTA, and environmental and other issues involved in entering into and implementing trade agreements—that Congress and the President may assess in making foreign trade and foreign relations decisions. Requiring FMCSA to study the environmental effects of the President's action to lift a trade moratorium is inconsistent with Congress's exclusion of Presidential action from the requirements of NEPA and the CAA, and would not be compatible with FMCSA's implementation of its discrete duties within its own sphere of responsibility and expertise.

1. a. The President is vested with express statutory authority to determine whether Canadian and Mexican truck and bus operators may operate in the United States. See 49 U.S.C. 13902(c). Before 1982, motor carriers domiciled in

Canada and Mexico were able to obtain certification from the Interstate Commerce Commission (ICC) to operate within the United States. See 49 U.S.C. 301 *et seq.* (1976). In 1982, however, Congress enacted a two-year moratorium on new grants of United States operating authority to motor carriers from those countries. 49 U.S.C. 10922(*l*)(1) (1982). Congress enacted the moratorium in response to concerns that United States motor carriers were being denied the same access to Canadian and Mexican markets that carriers from those countries had to the United States. See Pet. App. 56a. Congress authorized the President to extend the moratorium beyond the initial two years if Canada or Mexico "substantially prohibit[ed]" operations by United States carriers, 49 U.S.C. 10922(*l*)(1) (1982), and to lift or modify the moratorium if he determined that doing so was in the "national interest," 49 U.S.C. 10922(*l*)(2) (1982).

Shortly after the moratorium was imposed, the United States entered into a bilateral understanding with Canada, and President Reagan lifted the moratorium on new grants of operating authority to Canadian carriers. See *Determination Under the Bus Regulatory Reform Act of 1982*, 47 Fed. Reg. 54,053 (1982); see Pet. App. 56a. In a series of actions under the 1982 statute, however, Presidents Reagan, Bush, and Clinton subsequently extended the moratorium on new grants of authority to Mexican motor carriers. See Pet. App. 9a & n.2 (citing presidential orders); 49 U.S.C. 13902 note. Although the moratorium did not apply to Mexican carriers that already had authority to operate in the United States or that were not required to obtain operating authority subject to the moratorium (such as carriers that operated solely in commercial zones along the United States-Mexico border), the Presidential actions prevented additional Mexican carriers from obtaining grants of operating authority to provide trucking services and scheduled bus services into or

within the United States beyond the border zones. See Pet. App. 9a, 56a-57a.

In 1995, Congress recodified the statute that authorized the moratorium and amended it to provide that the existing Presidential restrictions on new operations by Mexican motor carriers would remain in effect "unless and until" the President made an express determination to continue, remove, or modify those restrictions. Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, Tit. I, § 103, 109 Stat. 880 (49 U.S.C. 13902(c)(4)).[1] Under the 1995 law, the President is empowered to impose new restrictions on Canadian and Mexican motor carriers upon a determination that policies or practices of Canada or Mexico impose "unreasonable or discriminatory" burdens on United States motor carriers seeking to operate in those countries. 49 U.S.C. 13902(c)(1). The President may remove or modify existing restrictions if he determines that doing so would be "consistent with the obligations of the United States under a trade agreement or with United States transportation policy." 49 U.S.C. 13902(c)(3). If the President allows foreign carriers to obtain authority to provide service in the United States, those carriers are subject to "all applicable laws and regulations pertaining to fitness, safety of operations, financial responsibility, and [federal] taxes." 49 U.S.C. 13902(c)(8).

b. Congress enacted the 1995 amendments to the moratorium law—which expressly authorize the President to

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[1] There are approximately 4.5 million northbound truck crossings of the United States-Mexico border each year. See J.A. 85, Fig. 3-2. Because of the moratorium, Mexican cargo that enters the United States by truck generally is transported by Mexican carriers only to terminals within the border commercial zones, where it is transferred to United States carriers for transport to its final destination. Passengers using scheduled bus services must follow similar procedures for their trips from Mexico to the United States. See J.A. 123-124; Pet. 25-26.

modify the moratorium in light of a trade agreement—against the background of NAFTA. In 1990, the United States, Mexico, and Canada initiated negotiations with the goal of eliminating or reducing trade barriers and creating a free-trade area that encompasses the three countries. In December 1992, the leaders of the three nations signed NAFTA. Congress approved and took steps to implement NAFTA through the North American Free Trade Agreement Implementation Act (NAFTA Implementation Act), Pub. L. No. 103-182, 107 Stat. 2057 (19 U.S.C. 3301-3473). See generally Pet. App. 7a-8a. In NAFTA Annex I, 32 I.L.M. at 742 (Schedule of the United States), the United States agreed to phase out the moratorium and, by January 2000, permit Mexican carriers to obtain operating authority for cross-border service from Mexico to points in the United States beyond the border area. NAFTA took effect on January 1, 1994. See *Memorandum on Implementation of NAFTA*, 29 Weekly Comp. Pres. Doc. 2641 (Dec. 27, 1993); 19 U.S.C. 3311(b).

On NAFTA's effective date, President Clinton began the incremental modification of the trade moratorium by allowing the licensing of Mexican carriers to provide certain bus services in the United States. See Pet. App. 57a. Due to concerns about the adequacy of Mexico's regulation of motor carrier safety, however, President Clinton did not continue to ease the moratorium on the timetable specified in NAFTA. See *id.* at 57a-58a; J.A. 53; see also C.A. Supp. E.R. 17-20; *Application by Certain Mexican Motor Carriers to Operate Beyond U.S. Municipalities and Commercial Zones on the U.S.-Mexico Border*, 66 Fed. Reg. 22,371-22,372 (2001).

The government of Mexico challenged the United States' implementation of NAFTA's motor carrier provisions by filing complaints under NAFTA's dispute-resolution process. See Pet. App. 59a. In February 2001, an international arbi-

tration panel convened under that process determined that the "blanket refusal" by the United States "to review and consider for approval any Mexican-owned carrier applications for authority to provide cross-border trucking services was and remains a breach of the U.S. obligations under [NAFTA]." J.A. 279. The arbitration panel "recommend[ed] that the United States take appropriate steps to bring its practices with respect to cross-border trucking services * * * into compliance with its obligations under the applicable provisions of NAFTA." J.A. 280.

Almost immediately after the arbitrators' decision, President Bush made clear his intention to lift the moratorium on cross-border operations following the preparation of new regulations governing grants of operating authority to Mexican motor carriers, in order to comply with NAFTA and promote trade between the United States and Mexico. Pet. App. 10a; J.A. 53; Pet. 5 & n.2.

c. The Federal Motor Carrier Safety Administration is the agency within DOT that is responsible for motor carrier safety and registration. See 49 U.S.C. 113(f).[2] FMCSA's statutory mandates include "ensur[ing]" safety, see 49 U.S.C. 31136; establishing minimum levels of financial responsibility for motor carriers, see 49 U.S.C. 31139; and prescribing federal standards for safety inspections of commercial motor vehicles, see 49 U.S.C. 31142. FMCSA must grant registration to all domestic or foreign motor carriers that are "willing and able to comply with" the applicable safety, fit-

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[2] In 1999, Congress transferred responsibility for motor carrier safety within DOT from the Federal Highway Administration to the newly created FMCSA. See Motor Carrier Safety Improvement Act of 1999, Pub. L. No. 106-159, 113 Stat. 1748; 49 U.S.C. 113. Previously, when Congress had abolished the ICC, it assigned most of the ICC's responsibilities for motor carrier operations to the Secretary of Transportation. See ICC Termination Act of 1995, Pub. L. No. 104-88, § 101, 109 Stat. 804 (abolishing ICC); 49 U.S.C. 13301, 13501. See also J.A. 51.

ness, and financial-responsibility requirements. 49 U.S.C. 13902(a)(1). FMCSA has no authority to impose or enforce emissions controls or establish other environmental requirements unrelated to motor carrier safety, or to deny motor carriers operating authority based on such criteria. See J.A. 51-52. The Environmental Protection Agency (EPA), not FMCSA, administers the program under the Clean Air Act that establishes emissions standards for new motor vehicles and engines. See 42 U.S.C. 7521; J.A. 202.

In May 2001, following the President's statements of his intent to comply with the decision of the NAFTA arbitration panel and "in anticipation of the modification of the moratorium," J.A. 54, FMCSA published for comment proposed rules concerning safety regulation of Mexican motor carriers. One of the proposed rules (the Application Rule) addressed the establishment of a new application form specifically for Mexican carriers that seek cross-border operating authority. The proposed form required those carriers to submit more detailed safety-related information than is obtained from domestic or Canadian carriers, or would have been obtained from Mexican carriers under FMCSA's existing rules. See *Application by Certain Mexican Motor Carriers to Operate Beyond U.S. Municipalities and Commercial Zones on the U.S.-Mexico Border*, 66 Fed. Reg. at 22,371, 22,372.[3] Another proposed rule (the Safety Monitoring Rule) addressed the establishment of a safety-inspection regime for all Mexican motor carriers, including (but not limited to) the new carriers that would receive operating authority under the Application Rule. See *Safety Monitoring System and Compliance Initiative for Mexican Motor Carriers Operating in the United States*, 66 Fed. Reg. 22,415 (2001).[4]

[3] In 1995, as part of its efforts to prepare for NAFTA's implementation, the ICC had promulgated application requirements and an application form for Mexican carriers seeking authority to conduct cross-border operations. Pet. App. 57a; J.A. 32; see *Freight Operations by Mexican Motor Carriers: Implementation of North American Free Trade Agreement*, 60 Fed. Reg. 63,981 (1995). Approximately 190 applications were filed under the ICC's regulations. Pet. App. 58a; J.A. 53-54. Because the President did not modify the moratorium on cross-border operations on the schedule established by NAFTA, neither the ICC, nor its successor agencies within DOT (see note 2, *supra*), granted operating authority to any Mexican carriers under the regulations that the ICC promulgated in 1995.

[4] A third proposed rule that FMCSA issued on the same day concerned applications for operating authority by Mexican carriers operating solely within border commercial zones, which were not covered by the moratorium on cross-border operations. See *Revision of Regulations and Application Form for Mexican-Domiciled Motor Carriers to Operate in U.S. Municipalities and Commercial Zones on the U.S.-Mexico Border*, 66 Fed. Reg. 22,328 (2001). That rule does not pertain to the President's modification of the trade moratorium to allow cross-border operations and is not at issue in this case.

d. In December 2001, Congress enacted Section 350 of the Department of Transportation and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-87, 115 Stat. 864. Section 350 provided that no funds appropriated under the 2002 Appropriations Act could be "obligated or expended for the review or processing of an application by a Mexican motor carrier for authority to operate beyond United States municipalities and commercial zones on the United States-Mexico border" until, among other things, FMCSA implemented specific application and safety-monitoring requirements for Mexican carriers that, in some particulars, were not already contained in either the Application and Safety Monitoring Rules that FMCSA had proposed or the application rules established by the former ICC, see note 3, *supra*. Pub. L. No. 107-87, § 350(a), 115 Stat. 864; see Pet. App. 53a-54a, 61a-62a. Congress later extended the conditions of Section 350 to appropriations for Fiscal Years 2003 and 2004.

See Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, Div. I, Tit. III, § 348, 117 Stat. 419; Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, Div. F, Tit. I, § 130.

e. In January 2002, FMCSA issued a Programmatic Environmental Assessment for the proposed Application and Safety Monitoring Rules (and other proposed rules not at issue in this case). See J.A. 36-231. Under NEPA, federal agencies must prepare an environmental impact statement (EIS) before taking any "major federal action[] significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C). The Council on Environmental Quality (CEQ) has promulgated regulations to guide federal agencies in determining what actions are subject to that statutory requirement. See 40 C.F.R. 1500.3; *Andrus* v. *Sierra Club*, 442 U.S. 347, 357 (1979). The CEQ regulations allow an agency to prepare a more limited document, known as an environmental assessment (EA), if the agency has neither established a categorical exclusion that excuses the proposed action from the requirement of environmental analysis, nor already determined to prepare a full EIS. See 40 C.F.R. 1501.3, 1501.4. An EA is a "concise public document" that "briefly provide[s] sufficient evidence and analysis for determining whether to prepare an [EIS]." 40 C.F.R. 1508.9(a). If the agency determines on the basis of the EA that an EIS is not required, then it must issue a "finding of no significant impact" (FONSI), which is a document "briefly presenting" the reasons why the agency action will not have a significant impact on the human environment. 40 C.F.R. 1501.4(e), 1508.13.

In the EA for its proposed Mexican-truck regulations, FMCSA noted several relevant circumstances and assumptions. FMCSA recognized that the proposed rules would have "no practical impact" until the occurrence of the "intervening event" of the President's modification of the

trade moratorium. J.A. 56, 57. FMCSA accordingly assumed in studying the effects of its proposed regulations that the President would lift the moratorium on granting new authority for cross-border operations. *Ibid.* FMCSA further noted that as a result of Section 350, the President's anticipated lifting of that moratorium would have no effect until FMCSA promulgated the required regulations. J.A. 57-58.

FMCSA noted "that the Presidential order to modify the moratorium could result in changes in trade volume and operations between the United States and Mexico," possibly including an increase in the number of trips by Mexican commercial motor vehicles in the United States (which might be offset by a reduction in trips by United States trucks and buses). J.A. 60. But FMCSA determined that "this and any other associated effects in trade characteristics would be the result of the modification of the moratorium" by the President, not FMCSA's implementation of the proposed safety regulations governing those carriers that take advantage of the opportunity afforded by the President's action. *Ibid.*

Against that background, FMCSA's EA addressed the environmental impacts associated with three different scenarios: (1) a Baseline Scenario, in which the President hypothetically would not act to modify the moratorium and FMCSA would not alter its existing regulations governing cross-border operations by Mexican motor carriers; (2) a No Action Alternative, in which (contrary to what was possible as long as the appropriations restrictions that Congress adopted during FMCSA's preparation of the EA remained in place) the President's modification of the trade moratorium hypothetically would be implemented without any change in FMCSA's existing regulations; and (3) the Proposed Action Alternative, in which the President would modify the moratorium and FMCSA would adopt its proposed regulations.

J.A. 56. The EA considered environmental impacts in the categories of traffic and congestion, J.A. 123-135, public safety and health, J.A. 135-136, air quality, J.A. 146-167, noise, J.A. 167-180, and socioeconomic factors and environmental justice, J.A. 180-192.

Based on that analysis, FMCSA concluded that the environmental impacts of the proposed Application and Safety Monitoring rules "are expected to be minor." J.A. 193. FMCSA noted that "the Proposed Action by FMCSA is mostly administrative," with "[t]he only area of potential [environmental] concern" being a "marginal[] increase" in the number of roadside inspections of Mexican trucks and buses due to the proposed regulations. *Ibid.* The minor environmental effects of those increased inspections (such as emissions and noise from trucks being inspected, and danger to passing motorists), FMCSA explained, could be addressed and avoided in the inspections process, see 42 U.S.C. 4332(2)(C)(ii). J.A. 193-196.[5] In addition, the increased inspection-related emissions would be partially or wholly offset by an incidental air-quality benefit of the new safety regulations—that FMCSA's adoption of stricter safety requirements might incrementally reduce the number of Mexican trucks operating in the United States, see J.A. 126, 137, 157, 167. FMCSA accordingly concluded in the EA that "[t]he Proposed Action by FMCSA has no significant

[5] FMCSA estimated that, in 2002, Mexican operators would operate approximately 72,000 commercial motor vehicles subject to the new regulations (of which about half would engage in operations outside the border commercial zones), and there would be approximately 230,000 inspections of those vehicles. J.A. 67, 132, 165. By contrast, there were approximately 4.5 million commercial motor vehicles operating in the United States. J.A. 149. Furthermore, new cross-border operations by Mexican-domiciled trucks often would substitute for, rather than be cumulative of, operations by United States trucks. See J.A. 135.

impacts and thus requires no mitigation" before adoption of the proposed regulations. J.A. 196.

On the same day that it released the EA, FMCSA issued a FONSI stating that the EA "provides sufficient evidence and analysis for determining that an environmental impact statement is not required" because the proposed regulations "would have no significant effect on the human environment." J.A. 34-35.

f. On March 19, 2002, FMCSA issued its Application Rule (Pet. App. 53a-124a) and Safety Monitoring Rule (*id.* at 125a-202a). FMCSA issued both rules as "interim" final rules and delayed their effective date until May 3, 2002, to allow public comment on provisions that FMCSA added to the proposed regulations to satisfy the requirements of Section 350, which had been enacted after the proposed regulations were published. See *id.* at 53a-54a, 61a-62a, 125a, 147a-149a. In preambles to the new regulations, FMCSA explained that they were designed to implement the requirements of Section 350 and "ensure the safe operation of Mexico-domiciled motor carriers in the United States." *Id.* at 54a, 126a; see *id.* at 127a-128a.

In the regulatory preambles, FMCSA relied on the January 2002 EA and FONSI to demonstrate its satisfaction of NEPA's requirements in promulgating the Application and Safety Monitoring Rules. Pet. App. 64a-65a, 106a-107a, 154a-155a, 182a. Next addressing Clean Air Act issues, FMCSA determined that it was not required to perform a so-called "conformity review" of the proposed regulations under 42 U.S.C. 7506(c)(1). Pet. App. 65a-66a, 155a. Section 7506(c)(1) provides that "[n]o department, agency, or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to" the requirements of a state air-quality implementation plan that has been established under the CAA. 42

U.S.C. 7506(c)(1). EPA has promulgated regulations implementing the conformity-review requirement. See 40 C.F.R. Pt. 93. Under those regulations, a federal agency need not conduct a full-blown conformity review if its intended action falls within one of several regulatory exemptions, including an exemption for actions that will not result in direct or indirect emissions above specified threshold levels. 40 C.F.R. 93.153(b).

Consistent with the air-quality analysis of the EA, see J.A. 146-167, FMCSA determined in pertinent part that emissions attributable to the Application and Safety Monitoring Rules (*i.e.*, emissions from increased roadside inspections of Mexican trucks that would be granted authority to operate in the United States after the moratorium was lifted) would be below EPA's threshold emission levels and a full conformity review therefore was not required under the CAA. Pet. App. 65a-66a, 155a. Also consistent with the EA, FMCSA supported its determination that no conformity review was required under the CAA by again explaining that its rulemakings were "actions to improve FMCSA's regulatory oversight" of motor carrier safety, "not * * * to modify the moratorium and allow Mexican trucks to operate beyond the border," which is an action outside FMCSA's authority and was for the President to decide. *Id.* at 66a, 79a.[6]

2. In November 2002, after FMCSA promulgated the Application and Safety Monitoring Rules, the President lifted the moratorium insofar as it prohibited qualified motor

[6] FMCSA also relied on EPA's regulation creating an exemption from the CAA's conformity-review requirement for agency rulemakings. See Pet. App. 65a-66a; 40 C.F.R. 93.153(c)(2)(iii). The court of appeals found that exemption inapplicable to FMCSA's Application and Safety Monitoring Rules. See Pet. App. 48a-51a. The court of appeals' rejection of that alternative ground for FMCSA's conformity-review decision is not at issue in this case. See Pet. 10 n.4.

carriers domiciled in Mexico from obtaining operating authority to provide cross-border truck and scheduled bus services. Pet. App. 232a-234a. The President determined that permitting cross-border operations is "consistent with obligations of the United States under NAFTA and with our national transportation policy," and that "expeditious action is required to implement th[e] modification to the moratorium" on United States operations by Mexican motor carriers. *Id.* at 233a. The President further noted that, when Mexican motor carriers obtain authorization to provide cross-border service, they "will be subject to the same Federal and State laws, regulations, and procedures that apply to carriers domiciled in the United States," including safety and environmental laws. *Id.* at 233a-234a. The President left the moratorium in place with respect to any authorization of Mexican-domiciled motor carriers to provide truck or bus services between points in the United States. *Ibid.*

3. Before the President acted, respondents had filed petitions for judicial review of the Application and Safety Monitoring Rules, asserting that the rules were promulgated in violation of NEPA, the conformity requirement of the CAA, and the Administrative Procedure Act (APA), 5 U.S.C. 701-706. See Pet. App. 13a. In January 2003, the Ninth Circuit granted the petitions and set aside the rules, thus preventing implementation of the President's border-opening decision. *Id.* at 1a-52a.[7]

[7] On the same day that FMCSA published the Application and Safety Monitoring Rules, it also promulgated a rule to establish training and certification requirements for all persons who conduct safety inspections and audits of domestic or foreign motor carriers under FMCSA's regulations. See Pet. App. 203a-220a (Auditor Certification Rule). Although the Auditor Certification Rule is not limited to inspections of Mexican motor carriers, Section 350 made promulgation of that rule one of the prerequisites to expending funds on processing Mexican carriers' applications for cross-border operating authority. See Pub. L. No. 107-87,

a. The court of appeals first determined (Pet. App. 14a-26a) that respondent Public Citizen—which alleges that some of its members who live near the Mexican border would suffer adverse health consequences from increased emissions attributable to cross-border operations by Mexican commercial vehicles, see *id.* at 16a-17a; J.A. 491, 496-497—has standing to challenge FMCSA's safety regulations. The court reasoned that Public Citizen sufficiently alleged both causation and redressability because (1) Mexican trucks would be able to conduct cross-border operations (possibly leading to adverse health effects) if FMCSA's safety regulations were upheld, and (2) if the petition for review were granted, then trucks of new Mexican carriers would be temporarily excluded from the United States by virtue of Section 350, pending FMCSA's completion of a new environmental review. See Pet. App. 22a-23a.[8]

b. Addressing the merits of respondents' challenge to the adequacy of FMCSA's NEPA review, the court of appeals concluded that the EA was deficient because FMCSA failed to give adequate consideration to the overall environmental impact of lifting the moratorium on new cross-border operations by Mexican trucks, and instead largely confined its analysis to the limited effects of FMCSA's safety regulations themselves. Pet. App. 28a-43a. Quoting CEQ's regulations,

§ 350(a)(10)(B), 115 Stat. 866. The court of appeals invalidated the Auditor Certification Rule as well as the Application and Safety Monitoring Rules. See Pet. App. 43a-45a. After the Ninth Circuit's decision, however, FMCSA reissued the Auditor Certification Rule on the basis of an EA that addressed both NEPA and CAA issues with respect to that rule alone. See *Safety Auditor Certification: Notice of Statutory Compliance Date*, 68 Fed. Reg. 74,287 (2003). This Court's disposition of the instant case will have no direct effect on the reissued Auditor Certification Rule.

[8] Although the government argued in the court of appeals that respondents lack standing, the petition for a writ of certiorari did not ask this Court to review the standing issue.

the court determined that FMCSA was required to consider the effects of lifting the moratorium on cross-border operations because "the President's rescission of the moratorium was 'reasonably foreseeable' at the time the EA was prepared and the decision not to prepare an EIS was made." *Id.* at 31a (quoting 40 C.F.R. 1508.7, 1508.8(b)). The court of appeals likewise stated that it was "illogical" for FMCSA to distinguish between the environmental effects of the President's trade action and the environmental effects of the agency's Application and Safety Monitoring Rules themselves. *Id.* at 37a.

The court further concluded that, in studying the long-term effects of the border opening, FMCSA should have determined the most likely routes of Mexican truck traffic and then conducted localized environmental analysis of that traffic for particular geographic areas. See Pet. App. 33a-39a. The court also faulted FMCSA for failing to consider additional alternatives to its proposed safety rules, "such as, for example, proposing more stringent controls on incoming Mexican trucks." *Id.* at 42a. The court of appeals thus remanded the case for the preparation of a "full Environmental Impact Statement." *Id.* at 52a.

c. For similar reasons, the court of appeals directed FMCSA to prepare a full Clean Air Act conformity determination for the challenged regulations. Pet. App. 52a. The court concluded that FMCSA's determination that emissions attributable to the safety rules would be below the threshold levels established in 40 C.F.R. 93.153(b)(1) was not "reliable" because, like FMCSA's NEPA analysis, the agency's CAA determination reflected what the court characterized as an "illusory distinction between the effects of the regulations themselves and the effects of the presidential rescission of the moratorium on Mexican truck entry." Pet. App. 47a. The court thus concluded that FMCSA is required under the CAA and EPA's regulations

to conduct a region-by-region review of opening the border to determine whether the threshold emission levels specified in 40 C.F.R. 93.153(b)(1) will be exceeded for particular areas and, if so, whether the border opening would conform to the applicable state air-quality implementation plan. Pet. App. 47a-48a.

d. The court of appeals recognized that, due to the requirements of Section 350, its invalidation of FMCSA's rulemakings had the effect of blocking implementation of the President's action to allow grants of cross-border operating authority to Mexican carriers. Pet. App. 23a. The court of appeals nevertheless expressed the view that its decision did not "touch on" the President's "clear, unreviewable discretionary authority to modify the moratorium pursuant to 49 U.S.C. § 13902(c)." *Id.* at 26a.

SUMMARY OF ARGUMENT

Respondents seek to use safety rulemakings of the Federal Motor Carrier Safety Administration to press environmental concerns about the President's determination to lift the moratorium on cross-border operations by Mexican motor carriers. That trade action, however, was within the President's constitutional and statutory authority. FMCSA has no assigned role in determining whether the moratorium should be lifted or modified, and cannot deny operating authority to a motor carrier based on environmental considerations. This case thus presents the question whether environmental-review requirements that apply to FMCSA's promulgation of *safety* rules for Mexican motor carriers obligate FMCSA to scrutinize the effects of a foreign policy and foreign trade decision of the President, which is entirely outside the scope of FMCSA's assigned responsibilities.

I. It was not arbitrary or capricious for FMCSA to limit its review under the National Environmental Policy Act to the effects of its particular safety requirements, without addressing the environmental impacts of the President's decision to allow new cross-border operations by Mexican motor carriers. NEPA's environmental-review requirements apply only to federal "agencies," 42 U.S.C. 4332(2)(C), and the Council on Environmental Quality has promulgated regulations expressly providing that actions of the President are not subject to NEPA's requirements. See 40 C.F.R. 1508.12. Respondents have never suggested that, apart from the President's action to lift the moratorium on new cross-border operating authority, FMCSA's Application and Safety Monitoring Rules will have any significant environmental effects. Instead, they have challenged FMCSA's decision not to study emissions assertedly associated with the President's border-opening decision. Accordingly, NEPA's exception for Presidential action applies in this case.

The court of appeals' contrary conclusion rests on its determination that it was foreseeable that the President would take his border-opening action after FMCSA promulgated its new safety regulations. Yet FMCSA's safety rulemakings were a response to the President's previously announced intention to lift the trade moratorium on new authorizations for cross-border services in accordance with the Nation's international commitments, not vice-versa. Furthermore, FMCSA's promulgation of new safety rules did not obligate the President to carry through with terminating the moratorium.

Respondents have argued in this case that Section 350 of the 2002 Appropriations Act established a "but for" causal relationship between FMCSA's promulgation of new safety regulations and its implementation of the President's lifting of the moratorium on new grants of cross-border operating authority. Under NEPA and this Court's decisions, however, a "but for" relationship is not enough to require FMCSA to study the environmental effects of the President's decision. The clear division of responsibility between

the President and FMCSA under the Constitution and the relevant statutory provisions establishes the dividing line between those effects for which FMCSA is responsible under NEPA and those effects, including the opening of the border, for which it is not responsible. Further, there would be no decision-making benefit from preparing the EIS that the court of appeals required in this case, because FMCSA has no authority over the border-opening decision and the President specifically was not required to weigh environmental concerns under NEPA in taking his trade action.

Any motor vehicle emissions that result from the President's decision to end the trade moratorium likewise are not a "cumulative impact" of FMCSA's safety rulemakings that had to be studied under the CEQ regulations. CEQ's regulations require agencies to study the incremental environmental effects of their *own* actions in the context of foreseeable future actions by other individuals and entities. See 40 C.F.R. 1508.7. The correct focus of a NEPA investigation is thus the agency's own proposed action, which, in this case, does not include the President's lifting of the trade moratorium.

II. Just as the President is not a federal "agency" subject to NEPA, he is not a "department, agency, or instrumentality of the Federal Government" under the Clean Air Act, 42 U.S.C. 7506(c)(1). Accordingly, the President's action to open the border is exempt from the CAA's conformity-review requirement. Furthermore, under the administrative regulations that implement the conformity-review requirement, a bare "but for" relationship between an agency action and air emissions is not alone enough to make the emissions attributable to the agency action. Under the regulations, any increased emissions associated with allowing additional Mexican trucks and buses to operate in the United States are neither "direct emissions" of FMCSA's safety rulemakings (because they will not occur at the time and place that

FMCSA's safety program is implemented) nor "indirect emissions" of those safety rulemakings (because, among other things, FMCSA has no ongoing programmatic responsibility for the emissions). See 40 C.F.R. 93.152. Accordingly, FMCSA did not abuse its discretion in defining the scope of its CAA conformity analysis.

ARGUMENT

The trade policy that respondents seek to block arises from the valid exercise of powers that the Constitution vests specifically in the President and the Congress. The President's authority over foreign affairs is manifested by his powers as Commander in Chief of the armed forces (U.S. Const. Art. II, § 2, Cl. 1), to negotiate treaties (*id.* Art. II § 2, Cl. 2), to "receive Ambassadors and other public Ministers" (*id.* Art. II, § 3), and to "take Care that the Laws be faithfully executed" (*ibid.*). The President is the Nation's "guiding organ in the conduct of our foreign affairs," in whom the Constitution vests "vast powers in relation to the outside world." *Ludecke* v. *Watkins*, 335 U.S. 160, 173 (1948); see *Department of the Navy* v. *Egan*, 484 U.S. 518, 529 (1988) (noting "the generally accepted view that foreign policy was the province and responsibility of the Executive") (citation omitted). Among his other foreign-affairs duties, the President is responsible for negotiating and ensuring compliance with international trade agreements. See generally *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 318-321 (1936).

For its part, Congress has "broad, comprehensive" power under the Foreign Commerce Clause of the Constitution, Art. I, § 8, Cl. 3, to "regulate Commerce with foreign Nations." *United States* v. *12 200-Ft. Reels of Super 8MM. Film*, 413 U.S. 123, 125-126 (1973); accord *California Bankers Ass'n* v. *Schultz*, 416 U.S. 21, 46 (1974) ("The plenary authority of Congress over * * * foreign commerce is not

open to dispute."). In the exercise of that power, Congress frequently vests authority and discretion in the President to impose, modify, or rescind measures affecting foreign trade and commerce. See, *e.g.*, *Curtiss-Wright Export Corp.*, *supra*.

The North American Free Trade Agreement and ensuing trade reforms arise from a joint exercise of the President's foreign affairs power and Congress's foreign commerce power. Here, Congress has given the President express authority to determine whether, and to what extent, Mexican motor carriers should be granted access to United States markets. See 49 U.S.C. 13902(c). That authority includes the power to determine whether access should be granted pursuant to the obligations of the United States under NAFTA. See 49 U.S.C. 13902(c)(3). When the President lifted the moratorium and authorized FMCSA to begin processing applications for cross-border operations by Mexican carriers, see Pet. App. 232a-234a, he "act[ed] pursuant to an express * * * authorization of Congress" and his authority was "at its maximum, for it include[d] all that he possesses in his own right plus all that Congress can delegate." *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 375 (2000) (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635 (1952)).

FMCSA, by contrast, lacks any authority over foreign affairs or trade policy and has no assigned role in determining whether, or to what extent, Mexican carriers as a class should be allowed access to United States markets. Instead, FMCSA's relevant authority involves granting or refusing operating authority to particular Mexican motor carriers, based solely on whether they are "willing and able to comply with" United States safety and financial-responsibility standards. 49 U.S.C. 13902(a)(1). As the EA states, FMCSA "has no authority to deviate from, or add to, th[ose] criteria," and it "is statutorily precluded from considering environmental issues" in the course of deciding whether to grant operating authority to particular carriers. J.A. 52. If a carrier satisfies the applicable statutory and regulatory requirements, FMCSA "must grant the application." *Ibid.* Thus, as FMCSA explained in the EA, "but for the moratorium" it would be required to grant operating authority to any Mexican carrier that submits an application demonstrating its willingness and ability to meet those criteria. *Ibid.* Cf. *Chicago & S. Air Lines, Inc.* v. *Waterman S.S. Co.*, 333 U.S. 103, 108-112 (1948) (discussing respective roles of the President and the CAB in approving foreign routes for air carriers).[9]

I. THE COURT OF APPEALS MISAPPLIED THE NATIONAL ENVIRONMENTAL POLICY ACT

The question presented to the court of appeals under NEPA was whether it was arbitrary and capricious for FMCSA to exclude from its environmental study the impacts of the foreign affairs and foreign trade action of the President, an action that FMCSA lacked any power to control. See Pet. App. 26a-28a; see also, *e.g.*, *Marsh* v. *Oregon Natural Resources Council*, 490 U.S. 360, 375-376 (1989) (applying "arbitrary and capricious" standard); *Kleppe* v. *Sierra Club*, 427 U.S. 390, 412 (1976) (scope of EIS is matter within agency's discretion and "[a]bsent a showing of arbitrary action, we must assume that the agencies have exercised this discretion appropriately"); *Anderson* v. *Evans*, 350 F.3d 815, 829 (9th Cir. 2003) ("If an agency

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[9] In its Application Rule, FMCSA determined to advise applicants for cross-border operating authority of their obligation to comply with "all pertinent Federal, State, local and tribal statutory and regulatory requirements, including labor and environmental laws." Pet. App. 91a. That statement on the application form is purely "informational in nature" and does not (and could not) impose any new environmental obligation. *Ibid.*

decides not to prepare an EIS, the decision not to do so may be overturned only if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'") (quoting 5 U.S.C. 706(2)(A)); *Town of Cave Creek* v. *FAA*, 325 F.3d 320, 327 (D.C. Cir. 2003) (same); *Indiana Forest Alliance, Inc.* v. *United States Forest Serv.*, 325 F.3d 851, 858-859 (7th Cir. 2003) (same). FMCSA did not act arbitrarily or capriciously or abuse its discretion in applying NEPA here, and the court of appeals erred in reaching a contrary conclusion.

First, the Constitution and federal statutes vest in the President the authority to allow cross-border operations by Mexican trucks and buses, and his actions are exempt from review under NEPA. See Point I.A.1, *infra*. Second, respondents have never disputed the correctness of FMCSA's conclusion that there are no significant environmental effects associated with the Application and Safety Monitoring Rules themselves, when the President's lifting of the moratorium on new grants of cross-border operating authority is taken as a given. See Point I.A.2, *infra*. Third, any environmental consequences of allowing cross-border operations by Mexican trucks are not "effects" of FMCSA's truck-safety rulemakings that had to be studied by FMCSA under the regulations promulgated by the Council on Environmental Quality to implement NEPA. Opening the border was the responsibility of the President. See Point I.B, *infra*. Fourth, for similar reasons, FMCSA was not required to undertake a "cumulative impact" analysis addressing the President's decision to open the border. See Point I.C, *infra*.

A. FMCSA Was Not Required To Prepare An EIS Addressing The President's Action To Lift The Trade Moratorium

The President's decision to lift the moratorium on cross-border operations by Mexican carriers is not subject to

NEPA's requirement of preparing an EIS addressing "major Federal actions significantly affecting the quality of the human environment," 42 U.S.C. 4332(2)(C).

1. Presidential Actions Are Exempt From NEPA's Environmental-Review Requirements

The EIS requirement applies only to "*agencies* of the Federal Government." 42 U.S.C. 4332(2) (emphasis added). The CEQ regulations implementing NEPA, which "are entitled to substantial deference," *Marsh*, 490 U.S. at 372, provide that the federal agencies subject to NEPA do not include "the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office." 40 C.F.R. 1508.12.

The exclusion of Presidential action from the EIS requirement arises from NEPA's text and, at a minimum, rests on a reasonable administrative interpretation of the statute. In ordinary usage, an "agency" is "a department or other administrative unit of a government." *Webster's Third New International Dictionary of the English Language Unabridged* 40 (1993). The President of the United States is not an "administrative unit." We are not aware of any court decision holding that the President is an "agency" subject NEPA, and the President historically has not purported to comply with NEPA in his decision-making.

Analogously, this Court determined in *Franklin* v. *Massachusetts*, 505 U.S. 788 (1992), that the President is not an "agency" subject to the Administrative Procedure Act, even though the APA's definitions of "agency" generally include "each authority of the Government of the United States" and specifically exclude Congress, the courts, and certain other entities without mentioning the President, see 5 U.S.C. 551(1), 701(b)(1). In *Franklin*, the Court reasoned that in light of the "separation of powers and the unique constitutional position of the President," "textual silence" in the

APA's definition of "agency" was "not enough to subject the President" to the procedural requirements and judicial-review provisions of the APA. 505 U.S. at 800-801. Rather, "an express statement by Congress" would be necessary to impose such restrictions on Presidential decision-making. *Id.* at 801.

The same principle applies here. Through NEPA, Congress imposed "action-forcing" procedures upon federal agencies in order to infuse environmental considerations into agency decision-making. See *Marsh*, 490 U.S. at 371 & n.14. Congress did not demonstrate any intention to affect the President's disposition of matters personally entrusted to him, particularly in sensitive and highly discretionary areas such as foreign affairs. As the facts surrounding this case well illustrate, subjecting the President's conduct of international diplomacy to the procedural requirements of NEPA would impair the President's ability to "speak for the Nation with one voice" and to make commitments concerning his own discretionary actions without fear that those commitments will be overridden by the courts. *Crosby*, 530 U.S. at 381, 382; see *Heckler* v. *Mathews*, 465 U.S. 728, 748 (1984) ("Great nations, like great men, should keep their word.") (brackets and citation omitted).

In any event, NEPA provides no private right of action. Its mandates are subject to judicial enforcement only through the APA, 5 U.S.C. 701-706. Actions of the President are unquestionably exempt from the APA under *Franklin*, 505 U.S. at 801. See *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 882 (1990). For that additional reason, the court of appeals erred in requiring FMCSA to prepare an EIS directed at the President's determination to allow cross-border operations by Mexican carriers. See *Chicago & S. Air Lines*, 333 U.S. at 111 ("Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate,

complex, and involve large amounts of prophecy. * * * They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility.").

2. Respondents Have Challenged Only FMCSA's Determination Not To Study The Environmental Effects Of The President's Action To Lift The Moratorium, Not FMCSA's Review Of The Effects Of Its Own Regulations

Throughout this case, respondents have made clear that they seek an EIS addressing new cross-border operations by Mexican motor carriers, rather than FMCSA's regulation of truck and bus safety. In their brief in opposition (at 7), for instance, respondents contended that an EIS is required because "[o]nce * * * FMCSA begins processing applications to cross the border from a large number of Mexico-domiciled trucks, substantial environmental harm will result because those trucks will emit significantly larger quantities of harmful air pollutants than U.S. trucks."[10] Respondents have reasoned that, if Mexican trucks are allowed to provide cross-border services, "there will be more Mexico-domiciled trucks in the United States." C.A. Br. of Public Citizen, et al. 32. Respondents have further argued that trucks domiciled in Mexico generally are older than trucks domiciled in the United States and are not subject to the same emissions requirements under the Clean Air Act and judicial consent decrees as United States-domiciled trucks, and, accordingly, truck emissions in the United States will increase. *Id.* at 32-

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[10] Accord, *e.g.*, C.A. Br. of Public Citizen, et al. 32 ("The challenged rules will have the practical effect—that is, the trucks crossing the border—that will create adverse environmental effects."); C.A. Br. of NRDC and Planning and Conservation League 17 ("The EA fails to take into account the public health effects that will result from an increase in the number of more polluting Mexican-domiciled trucks traveling in the U.S. once the Final Rules are implemented.").

35, 36-38; see J.A. 301-302 (rulemaking comments); but see J.A. 482-488 (government court of appeals brief, discussing respondents' theories).

None of the respondents argued in FMCSA's rulemaking proceedings that FMCSA should consider particular safety alternatives in light of environmental concerns. Respondents did not identify any different application or safety monitoring requirements that FMCSA arguably should have studied. Instead, respondents objected that the EA did not address "the effect of allowing thousands of heavily polluting Mexico-domiciled trucks to travel through * * * the United States"—*i.e.*, what they alleged to be the consequences of the *President's* decision to lift the moratorium on new grants of cross-border operating authority. J.A. 303; see J.A. 294 (comments of respondents NRDC, et al., arguing that FMCSA's proposed rules "would allow Mexican-owned trucks to drive throughout the United States, resulting in increased air pollution and other environmental hazards").

In the court of appeals, respondents similarly did not dispute the EA's conclusion that there are no significant environmental effects associated with the Application and Safety Monitoring Rules themselves, when the President's lifting of the moratorium is taken as a given in FMCSA's decisionmaking. Respondents instead faulted FMCSA for failing to study the environmental effects of "trucks crossing the border." C.A. Br. of Public Citizen, et al. 32.

As respondents have conceded in this Court (Br. in Opp. 25 & n.5), they waited until their reply brief in the court of appeals to advance a secondary argument that FMCSA should have "cho[sen] amongst various [safety] options * * * to alleviate environmental effects" of new cross-border operations by Mexican trucks. See C.A. Reply Br. of Public Citizen, et al. 13-15, 21. Although that argument addressed the substance of FMCSA's rulemakings, it was raised much too late to be considered in this case. See

Vermont Yankee Nuclear Power Corp. v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 553 (1978) (parties challenging agency's environmental review under NEPA must "alert[] the agency to [their] position and contentions" in administrative proceedings); *Eberle* v. *City of Anaheim*, 901 F.2d 814, 818 (9th Cir. 1990) (appellant may not raise new issues in reply brief).[11]

Revealingly, respondents have consistently relied on a report prepared by a firm called Sierra Research, Inc., which asserts that FMCSA's Proposed Action Alternative (under which the President would lift the moratorium on cross-border operations after FMCSA put its new Application and Safety Monitoring Rules in place) would have materially the same, supposedly harmful environmental effects as the No Action Alternative (under which—contrary to what actually was possible under the appropriations restriction of Section 350—the President would lift the moratorium and FMCSA, without issuing the new Application and Safety Monitoring Rules, would process applications from Mexican carriers under the then-existing rules that did not satisfy Section 350). See J.A. 301-303, 312. If the No Action Alternative and the Proposed Action Alternative are equally objectionable to respondents, then respondents must be challenging the lifting of the moratorium, not FMCSA's proposed rules. The

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[11] At the petition stage, respondents invoked (Br. in Opp. 25 n.5) the Ninth Circuit's practice of considering an appellant's arguments concerning issues the appellee injected into the case. See *United States* v. *Franco-Lopez*, 312 F.3d 984, 993 n.6 (9th Cir. 2002). But respondents did not identify anything in the government's appellate brief that supposedly raised, on their behalf, this alternative claim of agency error. Moreover, even if the Ninth Circuit's practice concerning arguments made in a reply brief is appropriate where (unlike here) the predicate for its invocation is present, that would not excuse respondents' previous procedural default, as a matter of administrative law under *Vermont Yankee*, in failing to present this issue to FMCSA.

President, however, has sole authority to decide whether to allow Mexican trucks to serve cross-border routes, and his decision is not subject to the EIS provisions of NEPA.[12]

B. The President's Lifting Of The Trade Moratorium Is Not An "Effect" Of FMCSA's Safety Rulemakings Under NEPA

The court of appeals determined (Pet. App. 28a-43a) and respondents argue (Br. in Opp. 18-21) that, even if the border-opening decision *itself* is exempt from NEPA, NEPA required FMCSA to attribute the *effects* of the border opening to its own safety regulations. The court of appeals reasoned principally that the implementing regulations promulgated by CEQ require FMCSA to study the environmental consequences of the President's action because his lifting of the moratorium on cross-border operations was "reasonably foreseeable" following FMCSA's rulemaking. Pet. App. 31a. For their part, respondents focus particularly on the appropriations restrictions of Section 350, asserting that the environmental consequences of opening the border are attributable to FMCSA because, as long as Section 350 remains in place, issuance of the new Application and Safety Monitoring Rules is a "prerequisite" to actually implementing the President's decision. Br. in Opp. 18. Neither rationale supports the court of appeals' holding.

1. FMCSA's Safety Rulemakings Did Not "Cause" The Alleged Environmental Effects Of The President's Action To Allow Cross-Border Operations

Under the CEQ regulations, the environmental "effects" that can trigger the EIS requirement, see 42 U.S.C.

[12] Another analysis on which respondents principally rely likewise addressed "emissions increases with Mexican heavy-duty diesel trucks operating in California and elsewhere in the U.S.," not the effects of the particular provisions of FMCSA's safety regulations. J.A. 387.

4332(2)(C)(ii), include "[d]irect effects, which are caused by the action and occur at the same time and place," 40 C.F.R. 1508.8(a), and "[i]ndirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable," 40 C.F.R. 1508.8(b). Under either the "direct effects" definition or the "indirect effects" definition, the effects associated with an agency action trigger NEPA obligations only if they are "caused by the action."

FMCSA was well within the bounds of its discretion in treating the President's action to open the border as "an intervening event" pertinent to its environmental assessment of the proposed regulations, J.A. 56, rather than an "effect" of the regulations themselves. The Application and Safety Monitoring Rules will not "cause" pollution from Mexican trucks and buses within the meaning of the CEQ regulations. FMCSA promulgated its safety regulations after the announcement of the President's intention to terminate the moratorium on new grants of cross-border operating authority, see Pet. App. 10a, 20a, 22a, and "in anticipation" of that action, *id.* at 54a. Thus, far from "causing" the effects of the President's decision to lift the moratorium, FMCSA's promulgation of new regulations was *caused by* the announcement of the President's intention to lift the moratorium.

Moreover, even after FMCSA promulgated its regulations, it remained possible that "political, diplomatic, military, or economic" developments "could have changed the President's mind" about lifting the moratorium. Pet. App. 22a. If the President had changed his mind, there would have been no significant increase in cross-border operations by Mexican carriers following FMCSA's promulgation of its safety rules. To hold that FMCSA's rulemaking "caused" the effects of the President's decision would be to require agencies that implement determinations of the President to

treat their own subordinate actions as the cause of Presidential decisions over which they have no control.[13]

2. *Congress's Enactment Of Section 350 Did Not Require FMCSA To Study The Effects Of Lifting The Moratorium*

a. Section 350 of the 2002 Appropriations Act does not render FMCSA responsible for the President's decision to allow cross-border operations by new Mexican carriers. That legislation made the adoption by FMCSA of certain safety-related requirements—concerning such matters as the contents of mandatory safety inspections, safety compliance reviews of Mexican motor carriers, and driver qualifications—a precondition to FMCSA's own review and processing of applications by Mexican carriers for cross-border operating authority. See App., *infra*, 12a-20a. Nothing in Section 350 gave FMCSA authority over the threshold determination whether Mexican motor carriers as a class should be allowed to conduct cross-border operations in the United States, or authorized FMCSA to tailor its safety regulations for Mexican carriers to accomplish trade or environmental objectives. To the contrary, Section 350 left intact the mandate of 49 U.S.C. 13902(a), which obligates FMCSA to grant operating authority to all motor carriers—including Mexican motor carriers—that are "willing and able to comply with" applicable safety and financial-responsibility requirements. FMCSA therefore was powerless even after the enactment of Section 350 to advance environmental objectives at the expense of its statutory mandates, or to

[13] The practical dependence of FMCSA's new safety requirements on the President's trade action distinguishes this case from one involving indirect effects that are related to a change in the physical environment that genuinely is brought about by the agency's action, such as changes in land use that are induced by the construction of a federal highway. See 40 C.F.R. 1508.8(b).

delay the promulgation of safety rules for the purpose of limiting its grants of operating authority to motor carriers that otherwise would be eligible to receive such authority.

Contrary to respondents' argument at the petition stage (Br. in Opp. 11-14, 20-21), moreover, Congress's re-enactment of Section 350, following the court of appeals' decision striking down the Application and Safety Monitoring Rules, says nothing about the proper application of NEPA in these circumstances. Section 350 did not amend the environmental or motor carrier safety laws, or address the Ninth Circuit's decision. The reasons identified in the legislative history for extending Section 350 beyond Fiscal Year 2002 involved only safety issues, not environmental concerns about cross-border operations by Mexican carriers. See S. Rep. No. 224, 107th Cong., 2d Sess. 84-85 (2002) (discussing Fiscal Year 2003 extension); see also S. Rep. No. 146, 108th Cong., 1st Sess. 69-70 (2003) (discussing satisfaction of Section 350's requirements in connection with Fiscal Year 2004 extension); H.R. Rep. No. 243, 108th Cong., 1st Sess. 81 (2003) (same). With respect to the legal issues in this case, Congress has been entirely silent. As respondents concede, such legislative inaction "has generally been rejected as an interpretive aid." Br. in Opp. 13 (citing *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186 (1994)).

b. Despite those considerations, the court of appeals suggested (Pet. App. 18a-23a, 31a) and respondents contend (see Br. in Opp. 18-20) that by requiring FMCSA to issue new safety rules before it could process applications by Mexican carriers for authority to conduct cross-border operations, Section 350 created a "but for" relationship between FMCSA's safety rulemaking and the possible environmental effects of allowing cross-border operations by Mexican motor carriers, and thereby triggered a NEPA obligation to conduct a full environmental evaluation of those effects. A bare "but for" relationship, however, is not sufficient even in

the ordinary case to establish the requisite causal relationship under NEPA between an agency action and possible environmental effects, and it certainly does not suffice here, given the narrow focus of Section 350 on FMCSA's safety rules and the supervening cause of the President's foreign affairs action.

The Court explained in *Metropolitan Edison Co.* v. *People Against Nuclear Energy*, 460 U.S. 766 (1983), that "[s]ome effects that are 'caused by' a change in the physical environment in the sense of 'but for' causation, will nonetheless not fall within [42 U.S.C. 4332]." *Id.* at 774. The causation problem in *Metropolitan Edison* involved a long "causal chain" between the agency's action affecting the physical environment (possible re-starting of the Three Mile Island nuclear power plant) and the claimed psychological harm from that action. See *id.* at 774-775. The Court stated more generally, however, that NEPA requires "a reasonably close causal relationship," and that "courts must look to the underlying policies or legislative intent in order to draw a manageable line between those causal changes that may make [the agency] responsible for an effect and those that do not." *Id.* at 774 & n.7.

Here, the clear division of responsibility between the President and FMCSA under the Constitution and the relevant statutory provisions "draw[s] a manageable line" between the effects for which FMCSA is responsible under NEPA and those for which it is not responsible. *Metropolitan Edison*, 460 U.S. at 774 n.7. FMCSA's actions within its sphere of safety regulation will not work any "change in the physical environment" (*id.* at 774) that is relevant to respondents' legal challenge. At a minimum, it was not arbitrary or capricious for FMCSA to focus its EA in accordance with those principles.

Nothing in Section 350 affects that conclusion. Section 350, which is entitled "Safety of Cross-Border Trucking

Between United States and Mexico," 115 Stat. 864, is directed solely to the safety-related responsibilities of FMCSA, requiring FMCSA to adopt additional safety criteria before it processes applications from Mexican carriers. Section 350 is predicated on the assumption that the trade moratorium would be modified by the President in accordance with NAFTA, and thus addresses only the manner in which the President's decision will be implemented. FMCSA reasonably construed Section 350 not to require it to step back from the immediate safety-related task at hand and evaluate under NEPA the environmental effects of allowing cross-border operations by Mexican carriers as a class.

Indeed, given the President's action in November 2002 to lift the moratorium on new grants of cross-border operating authority (which both FMCSA and the drafters of Section 350 reasonably anticipated, and which was an historical fact by the time of the court of appeals' decision, see Pet. App. 20a, 22a), FMCSA lacks discretion to refrain from meeting the safety-related requirements of Section 350. In light of the President's foreign trade action, 49 U.S.C. 13902(a)(1) effectively requires FMCSA to promulgate regulations that satisfy Section 350, so that the agency can fulfill its statutory mandate of processing applications by Mexican carriers that are "willing and able" to comply with federal safety, fitness, and financial-responsibility requirements.

c. The error in the court of appeals' and respondents' "but for" analysis is underscored by the fact that neither of the legislative purposes underlying NEPA's EIS requirement would be served by requiring FMCSA to study further the environmental impacts of lifting the moratorium on cross-border operations by Mexican carriers. See *Metropolitan Edison*, 460 U.S. at 774 n.7. The first purpose underlying the EIS requirement—ensuring that "in reaching its decision," an agency "will carefully consider[] detailed informa-

tion concerning significant environmental impacts," *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989), would not be served because FMCSA lacks any authority or rulemaking discretion relevant to retaining or lifting the trade moratorium.

Preparation of an EIS in this case also is not indicated by the second purpose of the statutory EIS requirement, which is providing relevant information "to the larger audience that may also play a role in both the decisionmaking process and the implementation of th[e agency's] decision." *Robertson*, 490 U.S. at 349. The relevant decision was the President's determination to allow new grants of cross-border operating authority in light of "the obligations of the United States under a trade agreement or * * * United States transportation policy." 49 U.S.C. 13902(c)(3); see Pet. App. 232a-234a. In making NEPA applicable only to federal agencies, Congress exempted the President's decision-making from the requirements of NEPA. Congress's objectives in enacting NEPA do not support a requirement that FMCSA prepare an EIS to inform any action of the President—much less an action that already had been taken by the time the court of appeals ruled—because Congress categorically determined that the burdens of preparing EISs in connection with actions of the President are *not* justified.[14]

[14] The fact that the President had formally lifted the moratorium on cross-border operations by the time of the court of appeals' decision highlights the further point that, even if the court of appeals was correct that FMCSA should have prepared an EIS *before* the President acted (which it was not), it does not follow that FMCSA must prepare an EIS under current conditions. More generally, even under the court of appeals' incorrect understanding of NEPA and the CAA, it was error for the court of appeals to require FMCSA to prepare an EIS and a CAA conformity review, rather than identifying the particular errors in FMCSA's analysis that the court of appeals believed to exist and then remanding to FMCSA for a determination whether an EIS and conformity review are required. See *INS* v. *Ventura*, 537 U.S. 12, 16 (2002) (discussing "the basic legal principles that govern remand" following court of appeals' determination of agency error).

d. As applied in this case, the "but for" approach of the court of appeals also contravenes the "rule of reason" that is inherent in NEPA and CEQ's implementing regulations. See *Marsh*, 490 U.S. at 373-374; cf. *National Wildlife Fed'n* v. *Appalachian Reg'l Comm'n*, 677 F.2d 883, 889 (D.C. Cir. 1981) ("Agency decisions setting limits to the scope of their environmental review are * * * rightfully guided by the so-called 'rule of reason.'"). In this context, reasonableness must be informed by the structure of our Government under the Constitution and the allocation of responsibilities under the applicable statutory scheme. No rule of reason inherent in NEPA could require FMCSA, a subordinate agency of the Executive Branch, to prepare an EIS pertaining to either (1) a decision committed to the President, who is not covered by NEPA, or (2) hypothetical action by FMCSA, in contravention of both 49 U.S.C. 13902(a)(1) and the President's determination to open the border, effectively to refuse to process and grant applications filed by eligible Mexican carriers that seek to provide cross-border services.

The EIS process ordered by the court of appeals would further delay the eventual removal of a trade moratorium that is harming consumers and causing conflict with the government of Mexico. See Pet. 24-26. There also is a substantial expense associated with preparing an EIS that addresses the border opening.[15] Those substantial costs are not justified by any commensurate benefit in "help[ing] public officials make decisions." 40 C.F.R. 1500.1(c) (de-

[15] FMCSA has entered into a contract with a vendor for the preparation of the EIS and CAA analysis mandated by the court of appeals. DOT advises that it now expects its total payments under the contract to be at least $2.25 million, if that analysis is required.

scribing purposes of NEPA). FMCSA has no responsibility for the trade action to which the EIS would relate.[16]

Numerous other lines of authority point to the same conclusion. In *Aberdeen & Rockfish Railroad* v. *SCRAP*, 422 U.S. 289 (1975), for example, this Court made clear that an agency is not required to prepare an EIS if the EIS would be superfluous and serve "no purpose" in light of the NEPA scheme as a whole. *Id.* at 325. CEQ's implementing regulations are to the same effect, stating that "NEPA documents must concentrate on the issues that are truly significant to the action in question" and should not "amass[] needless detail" concerning matters that are insignificant to the particular agency action. 40 C.F.R. 1500.l(b); see 40 C.F.R. 1500.1(c) ("NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action."). Requiring FMCSA to spend millions of dollars to study the potential effects of a decision that has already been made and over which FMCSA has no control would serve "no purpose" and constitute nothing more than "amassing needless detail." NEPA does not require such a pointless exercise.

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[16] As the court of appeals observed (Pet. App. 31a), NEPA requires federal agencies to comply with the EIS requirement "to the fullest extent possible." 42 U.S.C. 4332. That does not support respondents' position in this case, however. Congress included that language in NEPA to "make it clear that each agency of the Federal Government *shall* comply with the directives set out in [42 U.S.C. 4332(2)(C)] *unless* the existing law applicable to such agency's operations expressly prohibits or makes full compliance * * * impossible." *Flint Ridge Dev. Co.* v. *Scenic Rivers Ass'n*, 426 U.S. 776, 787-788 (1976) (quoting 115 Cong. Rec. 39,703 (1969)). There is no dispute here that FMCSA must apply NEPA. Similarly, the court of appeals' decision is not bolstered by Congress's statutory clarification that NAFTA implementation is subject to the Nation's environmental laws. 19 U.S.C. 3312(a); see Pet. App. 7a-8a. The issue is what NEPA requires, not whether NEPA applies to NAFTA implementation.

Moreover, in a uniform line of cases involving ministerial or otherwise nondiscretionary agency actions, the courts of appeals have recognized that agency actions that do not entail a significant exercise of discretion do not give rise to NEPA obligations, because "the information that NEPA provides can have no effect on the agency's actions." *Citizens Against Rails-to-Trails* v. *Surface Transp. Bd.*, 267 F.3d 1144, 1151 (D.C. Cir. 2001); see, *e.g.*, *City of New York* v. *Minet[]a*, 262 F.3d 169, 177-178 (2d Cir. 2001); *Sac & Fox Nation* v. *Norton*, 240 F.3d 1250 (10th Cir. 2001), cert. denied, 534 U.S. 1078 (2002); *American Airlines, Inc.* v. *Department of Transp.*, 202 F.3d 788, 803 (5th Cir.), cert. denied, 530 U.S. 1274 and 1284 (2000); *Aircraft Owners & Pilots Ass'n* v. *Hinson*, 102 F.3d 1421, 1425-1426 (7th Cir. 1996); *Sierra Club* v. *Babbitt*, 65 F.3d 1502, 1512 (9th Cir. 1995); *Goos* v. *ICC*, 911 F.2d 1283, 1296 (8th Cir. 1990); *Milo Community Hosp.* v. *Weinberger*, 525 F.2d 144, 148 (1st Cir. 1975). In this case, the ambit of FMCSA's discretion was confined to fashioning safety standards for Mexican carriers that would satisfy Section 350 and FMCSA's other statutory mandates, on the assumption that the President would lift the moratorium. FMCSA conducted its environmental-effects analysis of the Application and Safety Monitoring rules in that context and within the confines of its statutory authority. FMSCA did not have discretion to countermand any determination by the President that Mexican carriers would no longer be barred, and it accordingly had no obligation under NEPA to conduct an environmental analysis as if that were an available option.

Finally, and in addition to its inconsistency with general principles underlying NEPA, the court of appeals' application of NEPA in this case frustrates the operation of the statutory provision that expressly grants the President discretion to remove or modify the moratorium on cross-border operations by Mexican motor carriers. Cf. *Crosby*,

530 U.S. at 374-377. Section 13902(c)(5) of Title 49 generally requires the President to publish his determinations to alter the moratorium in order to allow public comment. But if the President "determines that expeditious action is required," the notice and comment requirement does not apply. 49 U.S.C. 13902(c)(5). In this case, the President determined under Section 13902(c)(5) that the moratorium needed to be modified expeditiously to comply with NAFTA and, accordingly, the public comment requirement did not apply. Pet. App. 233a. The court of appeals' remand order effectively overrides the President's determination under Section 13902(c)(5) that a public proceeding on the decision to open the border, pursuant to NAFTA, is not warranted.

3. FMCSA Was Not Required To Undertake A "Cumulative Impact" Analysis Addressing The President's Border-Opening Decision

The court of appeals also erred in relying (Pet. App. 30a-31a) on CEQ regulations addressing so-called "cumulative impacts." The regulations provide that agencies must consider cumulative impacts, in addition to the direct and indirect effects of a proposed action, in evaluating the effects of the agency action. 40 C.F.R. 1508.25(c)(3), 1508.27(b)(7); see *Baltimore Gas & Elec. Co.* v. *Natural Resources Defense Council, Inc.*, 462 U.S. 87, 106-107 (1983) ("NEPA requires an EIS to disclose the significant * * * cumulative consequences of the environmental impact of a proposed action"). The regulations define "[c]umulative impact" as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. 1508.7.

CEQ's "cumulative impact" rules obligate agencies to consider the environmental effects of their actions in con-

text—*i.e.*, in light of "other past, present, or reasonably foreseeable future actions" of the agency itself or other actors. 40 C.F.R. 1508.7. FMCSA therefore was required to consider the effects of its Application and Safety Monitoring Rules in light of the President's foreseeable modification of the trade moratorium. It does not follow, however, that FMCSA had to treat the President's trade action as its own for purposes of NEPA analysis. Just the opposite is true. The "cumulative impact" that FMCSA had to consider involved the "incremental impact" of the safety rules themselves, in the context of the President's border-opening decision and other relevant circumstances. 40 C.F.R. 1508.7. Fulfilling that responsibility, FMCSA reasonably determined in the EA that its safety regulations would not result in a cumulatively significant impact on air quality in the only scenario in which they would have any consequential effect—namely, upon removal of the moratorium on cross-border operations—because (1) the only increased emissions resulting from the regulations would be the "negligible" inspection-related emissions, and (2) the new safety regulations might actually reduce emissions insofar as they could lower the number of Mexican trucks conducting cross-border operations in the United States. J.A. 166-167.

The court of appeals' misapplication of CEQ's "cumulative impact" rules is clearly revealed in its conclusion that it was "illogical" (Pet. App. 37a) for FMCSA to consider the possibility that the new safety rules might reduce the number of Mexican trucks operating in the United States and have an incidental air-quality benefit, see p. 12, *supra*, while also determining that any increase in air pollution associated with the President's border opening decision did not have to be studied in an EIS. Under CEQ's regulations, FMCSA had to study "the incremental impact of the action" it proposed to undertake. 40 C.F.R. 1508.7. The effects of the proposed safety regulations therefore had to be (and were)

considered in light of the anticipated termination of the prohibition on new grants of cross-border operating authority, but the effects of that trade action did not themselves have to be the subject of an EIS prepared by FMCSA because the lifting of the moratorium was not an action of FMCSA. FMCSA could properly take that supervening action by the President, and its environmental effects, as a given in determining what safety standards should be imposed when the President lifted the moratorium.

* * * * *

The core question in considering whether to prepare an EIS is whether the agency's proposed action would "significantly affect[] the quality of the human environment." 42 U.S.C. 4332(2)(C). Here, FMCSA reasonably determined, after the exhaustive analysis described in the EA, that the Application and Safety Monitoring Rules will not have any significant environmental effect. It was not arbitrary or capricious for FMCSA to decline to undertake the massive environmental review suggested by respondents and ordered by the court of appeals.

II. FMCSA'S SAFETY RULEMAKINGS ARE NOT SUBJECT TO THE CONFORMITY-REVIEW REQUIREMENTS OF THE CLEAN AIR ACT

Under the Clean Air Act and implementing regulations promulgated by the Environmental Protection Agency pursuant to 42 U.S.C. 7506(c)(4), a federal "department, agency or instrumentality" generally may not "engage in, support in any way or provide financial assistance for, license or permit, or approve any activity" that violates an applicable State air-quality implementation plan. 42 U.S.C. 7506(c)(1); 40 C.F.R. 93.150.[17] In its rulemaking decisions, FMCSA determined

[17] The FMCSA safety rulemakings in this case are subject to the conformity-review provisions of 40 C.F.R. Part 93, Subpart B, not the special provisions governing conformity reviews for certain transportation projects, 40 C.F.R. Pt. 51, Subpt. T. See 42 U.S.C. 7506(c)(2); 40 C.F.R. 93.153(a).

that emissions attributable to the Application and Safety Monitoring Rules (*i.e.*, emissions from increased roadside inspections of Mexican trucks) would be below threshold emissions levels set by EPA and a full conformity review under the Clean Air Act therefore was not required. Pet. App. 65a-66a, 155a. The court of appeals concluded that FMCSA must prepare a conformity determination that addresses the border opening in order to satisfy the CAA and EPA's implementing regulations. *Id.* at 46a-52a. The court's CAA analysis rested on essentially the same reasoning as its NEPA analysis, and it is similarly incorrect.

A. Presidential Action Is Exempt From The Conformity-Review Requirement

Just as the President is not a "federal agency" under NEPA and the APA, see Point I.A.1., *supra*, he is not a "department, agency, or instrumentality of the Federal Government" under the CAA and, therefore, the Presidential action to open the border is exempt from the conformity-review requirement. Actions of the President have never been held subject to the conformity-review requirement. Furthermore, the terms "department," "agency," and "instrumentality" are used elsewhere in the CAA in contexts that make clear that they do not encompass individual federal officers, much less the President himself. See 42 U.S.C. 7418(a) (imposing on "[e]ach department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government * * * and each officer, agent, or employee thereof" a duty to comply with federal and state air pollution laws), 7418(b) (allowing President to "exempt any emission source of any department, agency, or instrumentality in the executive branch"), 7604(e) (preserv-

ing citizen enforcement rights "against the United States, any department, agency, or instrumentality thereof, or any officer, agent, or employee thereof").

If the language of the CAA did not on its face establish the President's exempt status, the same conclusion would be compelled in any event by *Franklin*, which provides that "[o]ut of respect for the separation of powers and the unique constitutional position of the President, * * * textual silence is not enough" to subject discretionary Presidential decision-making to procedural requirements that are enforceable by the courts. *Franklin*, 505 U.S. at 800-801. Furthermore, although EPA's implementing regulations do not specifically address the President's status under Section 7506(c), those regulations use the term "federal agency"—which does not naturally include the President—to encompass the universe of all covered departments, agencies, and instrumentalities of the federal government. 40 C.F.R. 93.152 (definition of "[f]ederal [a]gency"). Similarly, in promulgating its implementing rules, EPA explained that the term "instrumentality," as used in Section 7506(c), serves merely to "includ[e] those Federal entities which are not specifically linked to a 'department' or 'agency,' including, for example, an independent Federal Commission." *Determining Conformity of General Federal Actions to State or Federal Implementation Plans*, 58 Fed. Reg. 13,838 (1993).

For these reasons, the conformity-review requirement does not apply to actions of the President. That rule is reinforced by the exemption of Presidential decision-making from the judicial review provisions of the APA, which are the basis for the instant litigation. See *Franklin*, 505 U.S. at 801.

B. Under EPA's Implementing Rules, The Air-Quality Effects Of Lifting The Trade Moratorium Are Not Emissions Associated With FMCSA's Safety Rulemakings

EPA's rules implementing the conformity-review requirement provide that "a conformity determination is required for each pollutant where the total of direct and indirect emissions in a nonattainment or maintenance area caused by a Federal action would equal or exceed" the threshold levels established by EPA. 40 C.F.R. 93.153(b). "Direct emissions" are defined as those covered emissions "that are caused or initiated by the Federal action and occur at the same time and place as the action." 40 C.F.R. 93.152. The term "indirect emissions" means covered emissions that:

> (1) Are caused by the Federal action, but may occur later in time and/or may be further removed in distance from the action itself but are still reasonably forseeable; and
>
> (2) The Federal agency can practicably control and will maintain control over due to a continuing program responsibility of the Federal agency.

40 C.F.R. 93.152.

In discussing those definitions, the court of appeals relied (Pet. App. 49a) on EPA's further clarification that "*[c]aused by*, as used in the terms 'direct emissions' and 'indirect emissions,' means emissions that would not otherwise occur in the absence of the Federal action," 40 C.F.R. 93.152. Echoing its earlier NEPA analysis, the court erroneously concluded that a "but for" relationship between an agency action and particular air emissions makes those emissions attributable to the agency action for purposes of the CAA's conformity-review requirement. Pet. App. 47a, 49a. The court overlooked that any motor carrier emissions associated with lifting the moratorium on cross-border operations were

not cognizable in FMCSA's conformity review in any event, because they were excluded by *other* elements of EPA's definitions of "direct emissions" and "indirect emissions."

Vehicle emissions that result from allowing Mexican motor carriers to apply for operating authority to provide cross-border services are not "direct emissions" of FMCSA's regulations because they do not "occur at the same time and place" as FMCSA's safety program. 40 C.F.R. 93.152. Nor do the truck emissions qualify as "indirect emissions" under EPA's definition; they are not emissions that FMCSA "can practicably control and will maintain control over due to a continuing program responsibility of the Federal agency." 40 C.F.R. 93.152. FMCSA has no control over the President's decision to lift the moratorium on cross-border operations by Mexican motor carriers, no significant ability to control the emissions of Mexican motor carriers engaged in cross-border operations, and no "continuing program responsibility" for those emissions.

When it issued its regulations implementing the conformity-review requirement, EPA determined that it was not "reasonable to conclude," under 42 U.S.C. 7506(c)(1), that a Federal agency "supports" activities or emissions over which the agency has no practicable control "based on the mere fact that, if one inspects the 'causal' chain of events, the activity or emissions can be described as being a 'reasonably foreseeable' result of the agency's actions." *Determining Conformity of General Federal Actions to State or Federal Implementation Plans*, 58 Fed. Reg. 63,214, 63,220 (1993). That interpretation, which is entitled to judicial deference and the D.C. Circuit has upheld, see *Environmental Def. Fund, Inc.* v. *EPA*, 82 F.3d 451, 464 (per curiam), amended,

92 F.3d 1209 (D.C. Cir. 1996), compels reversal of the court of appeals' ruling on the CAA issue.[18]

* * * * *

The practical harm of the court of appeals' incorrect CAA ruling may be even greater than the harm of its NEPA ruling. The conformity analysis contemplated by the court of appeals would require FMCSA to examine the potential impact of lifting the moratorium in scores of air quality control regions throughout the United States. If FMCSA were required to complete such an analysis, and if it concluded that the President's decision to open United States markets to Mexican carriers will cause an increase in air emissions above regulatory thresholds in any of the studied regions, then FMCSA would not be able to promulgate its safety rules—and the President's effort to bring the United States into compliance with its obligations under NAFTA and the arbitration decision of February 2001 would be further delayed—unless "conformity" to state air-quality plans somehow could be achieved. 42 U.S.C. 7506(c)(1)(B). Yet FMCSA has no authority to undo or alter the President's trade decision, or to regulate corresponding emissions. The obvious gap between the broad, foreign policy-related remedy respondents seek and FMCSA's very limited ability

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[18] In addition to its incorrect determination that the EA's "distinction between the effects of the [safety] regulations themselves and the effects of the presidential rescission of the moratorium on Mexican truck entry" is "illusory," the court of appeals expressed the view that "methodological flaws" in the EA, such as FMCSA's failure to analyze the truck emissions "on a local or regional basis," compromised the conformity analysis. Pet. App. 47a. Because FMCSA was not required to consider the truck emissions resulting from cross-border operations in its CAA conformity review at all, methodological issues concerning how the truck emissions should be analyzed cannot be a basis for overturning the agency's conformity determination.

to address CAA issues through its safety rulemakings reinforces the conclusion that FMCSA's determination of the proper scope of its CAA review was not arbitrary or capricious.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

THOMAS L. SANSONETTI
Assistant Attorney General

EDWIN S. KNEEDLER
THOMAS G. HUNGAR
Deputy Solicitors General

JEFFREY BOSSERT CLARK
Deputy Assistant Attorney General

AUSTIN C. SCHLICK
Assistant to the Solicitor General

JOHN L. SMELTZER
DAVID C. SHILTON
Attorneys

JEFFREY A. ROSEN
General Counsel

PAUL M. GEIER
Assistant General Counsel for Litigation

PETER J. PLOCKI
Senior Trial Attorney

BRIGHAM A. MCCOWAN
Chief Counsel

MICHAEL J. FALK
Acting Assistant Chief Counsel
Federal Motor Carrier Safety Administration
Department of Transportation

JOHN K. VERONEAU
General Counsel
Office of the United States Trade Representative
Executive Office of the President

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APPENDIX

STATUTES AND REGULATIONS INVOLVED

1. Administrative Procedure Act

Section 706 of Title 5 of the United States Code provides:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party,

and due account shall be taken of the rule of prejudicial error.

2. National Environmental Policy Act

a. Section 4332 of Title 42 of the United States Code provides in pertinent part:

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes[.]

b. Section 1508.7 of Title 40 of the Code of Federal Regulations provides:

Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

c. Section 1508.8 of Title 40 of the Code of Federal Regulations provides:

Effects include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

d. Section 1508.12 of Title 40 of the Code of Federal Regulations provides:

Federal agency means all agencies of the Federal Government. It does not mean the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office. It also includes for purposes of these regulations States and units of general local government and Indian tribes assuming NEPA responsibilities under section 104(h) of the Housing and Community Development Act of 1974.

e. Section 1508.25 of Title 40 of the Code of Federal Regulations provides:

Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (Secs. 1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

(a) Actions (other than unconnected single actions) which may be:

(1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

(i) Automatically trigger other actions which may require environmental impact statements.

(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.

(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

(2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

(3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

(b) Alternatives, which include:

(1) No action alternative.

(2) Other reasonable courses of actions.

(3) Mitigation measures (not in the proposed action).

(c) Impacts, which may be: (1) Direct; (2) indirect; (3) cumulative.

3. Clean Air Act

a. Section 7506(c)(1) of Title 42 of the United States Code provides:

No department, agency, or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to an implementation plan after it has been approved or promulgated under section 7410 of this title. No metropolitan planning organization designated under section 134 of title 23, shall give its approval to any project, program, or plan which does not conform to an implementation plan approved or promulgated under section 7410 of this title. The assurance of conformity to such an implementation plan shall be an affirmative responsibility of the head of such department, agency, or instrumentality. Conformity to an implementation plan means—

(A) conformity to an implementation plan's purpose of eliminating or reducing the severity and number of violations of the national ambient air quality standards and achieving expeditious attainment of such standards; and

(B) that such activities will not—

(i) cause or contribute to any new violation of any standard in any area;

(ii) increase the frequency or severity of any existing violation of any standard in any area; or

(iii) delay timely attainment of any standard or any required interim emission reductions or other milestones in any area.

The determination of conformity shall be based on the most recent estimates of emissions, and such estimates shall be determined from the most recent population, employment, travel and congestion estimates as determined by the metropolitan planning organization or other agency authorized to make such estimates.

b. Section 93.150 of Title 40 of the Code of Federal Regulations provides:

(a) No department, agency or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve any activity which does not conform to an applicable implementation plan.

(b) A Federal agency must make a determination that a Federal action conforms to the applicable implementation plan in accordance with the requirements of this subpart before the action is taken.

(c) Paragraph (b) of this section does not include Federal actions where:

(1) A National Environmental Policy Act (NEPA) analysis was completed as evidenced by a final environmental assessment (EA), environmental impact statement (EIS), or finding of no significant impact (FONSI) that was prepared prior to January 31, 1994; or

(2)(i) Prior to January 31, 1994, an environmental analysis was commenced or a contract was awarded to develop the specific environmental analysis;

(ii) Sufficient environmental analysis is completed by March 15, 1994 so that the Federal agency may determine that the Federal action is in conformity with the specific requirements and the purposes of the applicable SIP pursuant to the agency's affirmative obligation under section 176(c) of the Clean Air Act (Act); and

(iii) A written determination of conformity under section 176(c) of the Act has been made by the Federal agency responsible for the Federal action by March 15, 1994.

(d) Notwithstanding any provision of this subpart, a determination that an action is in conformance with the applicable implementation plan does not exempt the action from any other requirements of the applicable implementation plan, the National Environmental Policy Act (NEPA), or the Clean Air Act (Act).

c. Section 93.152 of Title 40 of the Code of Federal Regulations provides in pertinent part:

Direct emissions means those emissions of a criteria pollutant or its precursors that are caused or initiated by the Federal action and occur at the same time and place as the action.

* * * * *

Indirect emissions means those emissions of a criteria pollutant or its precursors that:

(1) Are caused by the Federal action, but may occur later in time and/or may be further removed in distance from the action itself but are still reasonably foreseeable; and

(2) The Federal agency can practicably control and will maintain control over due to a continuing program responsibility of the Federal agency.

4. ICC Termination Act of 1995, Pub. L. No. 104-88, as Amended

Section 13902 of Title 49 of the United States Code provides in pertinent part:

(a) MOTOR CARRIER GENERALLY.—

(1) IN GENERAL.—Except as provided in this section, the Secretary shall register a person to provide transportation subject to jurisdiction under subchapter I of chapter 135 of this title as a motor carrier if the Secretary finds that the person is willing and able to comply with—

(A) this part and the applicable regulations of the Secretary and the Board;

(B) any safety regulations imposed by the Secretary and the safety fitness requirements established by the Secretary under section 31144; and

(C) the minimum financial responsibility requirements established by the Secretary pursuant to sections 13906 and 31138.

(2) CONSIDERATION OF EVIDENCE; FINDINGS.—The Secretary shall consider and, to the extent applicable, make findings on, any evidence demonstrating that the registrant is unable to comply with the requirements of subparagraph (A), (B), or (C) of paragraph (1).

(3) WITHHOLDING.—If the Secretary determines that any registrant under this section does not meet the requirements of paragraph (1), the Secretary shall withhold registration.

(4) LIMITATION ON COMPLAINTS.—The Secretary may hear a complaint from any person concerning a registration under this subsection only on the ground that the registrant

fails or will fail to comply with this part, the applicable regulations of the Secretary and the Board, the safety regulations of the Secretary, or the safety fitness or minimum financial responsibility requirements of paragraph (1) of this subsection.

* * * * *

(c) RESTRICTIONS ON MOTOR CARRIERS DOMICILED IN OR OWNED OR CONTROLLED BY NATIONALS OF A CONTIGUOUS FOREIGN COUNTRY.—

(1) PREVENTION OF DISCRIMINATORY PRACTICES. —If the President, or the delegate thereof, determines that an act, policy, or practice of a foreign country contiguous to the United States, or any political subdivision or any instrumentality of any such country is unreasonable or discriminatory and burdens or restricts United States transportation companies providing, or seeking to proide, motor carrier transportation to, from, or within such foreign country, the President or such delegate may–

(A) seek elimination of such practices through consultations; or

(B) notwithstanding any other provision of law, suspend, modify, amend, condition, or restrict operations, including geographical restriction of operations, in the United States by motor carriers of property or passengers domiciled in such foreign country or owned or controlled by persons of such foreign country.

(2) EQUALIZATION OF TREATMENT.—Any action taken under paragraph (1)(A) to eliminate an act, policy, or practice shall be so devised so as to equal to the extent possible the burdens or restrictions imposed by

such foreign country on United States transportation companies.

(3) REMOVAL OR MODIFICATION.—The President, or the delegate thereof, may remove or modify in whole or in part any action taken under paragraph (1)(A) if the President or such delegate determines that such removal or modification is consistent with the obligations of the United States under a trade agreement or with United States transportation policy.

(4) PROTECTION OF EXISTING OPERATIONS.— Unless and until the President, or the delegate thereof, makes a determination under paragraph (1) or (3), nothing in this subsection shall affect–

(A) operations of motor carriers of property or passengers domiciled in any contiguous foreign country or owned or controlled by persons of any contiguous foreign country permitted in the commercial zones along the United States-Mexico border as such zones were defined on December 31, 1995; or

(B) any existing restrictions on operations of motor carriers of property or passengers domiciled in any contiguous foreign country or owned or controlled by persons of any contiguous foreign country or any modifications thereof pursuant to section 6 of the Bus Regulatory Reform Act of 1982.

(5) PUBLICATION; COMMENT.—Unless the President, or the delegate thereof, determines that expeditious action is required, the President shall publish in the Federal Register any determination under paragraph (1) or (3), together with a description of the facts on which such a determination is based and any proposed action to be taken pursuant to paragraph

(1)(B) or (3), and provide an opportunity for public comment.

(6) DELEGATION TO SECRETARY.—The President may delegate any or all authority under this subsection to the Secretary, who shall consult with other agencies as appropriate. In accordance with the directions of the President, the Secretary may issue regulations to enforce this subsection.

(7) CIVIL ACTIONS.—Either the Secretary or the Attorney General may bring a civil action in an appropriate district court of the United States to enforce this subsection or a regulation prescribed or order issued under this subsection. The court may award appropriate relief, including injunctive relief.

(8) LIMITATION ON STATUTORY CONSTRUCTION. —This subsection shall not be construed as affecting the requirement for all foreign motor carriers and foreign motor private carriers operating in the United States to comply with all applicable laws and regulations pertaining to fitness, safety of operations, financial responsibility, and taxes imposed by section 4481 of the Internal Revenue Code of 1986.

5. Department of Transportation and Related Agencies Act, 2002

Section 350 of the Department of Transportation and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-87, 115 Stat. 864, provides in pertinent part:

SAFETY OF CROSS-BORDER TRUCKING BETWEEN UNITED STATES AND MEXICO. (a) No funds limited or appropriated in this Act may be obligated or expended for the review or processing of an application by a Mexican motor carrier for authority to operate beyond United States municipalities and commercial zones on the

United States-Mexico border until the Federal Motor Carrier Safety Administration—

(1)(A) requires a safety examination of such motor carrier to be performed before the carrier is granted conditional operating authority to operate beyond United States municipalities and commercial zones on the United States-Mexico border;

(B) requires the safety examination to include—

(i) verification of available performance data and safety management programs;

(ii) verification of a drug and alcohol testing program consistent with part 40 of title 49, Code of Federal Regulations;

(iii) verification of that motor carrier's system of compliance with hours- of-service rules, including hours-of-service records;

(iv) verification of proof of insurance;

(v) a review of available data concerning that motor carrier's safety history, and other information necessary to determine the carrier's preparedness to comply with Federal Motor Carrier Safety rules and regulations and Hazardous Materials rules and regulations;

(vi) an inspection of that Mexican motor carrier's commercial vehicles to be used under such operating authority, if any such commercial vehicles have not received a decal from the inspection required in subsection (a)(5);

(vii) an evaluation of that motor carrier's safety inspection, maintenance, and repair facilities or man-

agement systems, including verification of records of periodic vehicle inspections;

(viii) verification of drivers' qualifications, including a confirmation of the validity of the Licencia de Federal de Conductor of each driver of that motor carrier who will be operating under such authority; and

(ix) an interview with officials of that motor carrier to review safety management controls and evaluate any written safety oversight policies and practices.

(C) requires that—

(i) Mexican motor carriers with three or fewer commercial vehicles need not undergo on-site safety examination; however 50 percent of all safety examinations of all Mexican motor carriers shall be conducted onsite; and

(ii) such on-site inspections shall cover at least 50 percent of estimated truck traffic in any year.

(2) requires a full safety compliance review of the carrier consistent with the safety fitness evaluation procedures set forth in part 385 of title 49, Code of Federal Regulations, and gives the motor carrier a satisfactory rating, before the carrier is granted permanent operating authority to operate beyond United States municipalities and commercial zones on the United States-Mexico border, and requires that any such safety compliance review take place within 18 months of that motor carrier being granted conditional operating authority, provided that—

(A) Mexican motor carriers with three or fewer commercial vehicles need not undergo onsite compliance review; however 50 percent of all compliance reviews of all Mexican motor carriers shall be conducted on-site; and

(B) any Mexican motor carrier with 4 or more commercial vehicles that did not undergo an on-site safety exam under (a)(1)(C), shall undergo an on-site safety compliance review under this section.

(3) requires Federal and State inspectors to verify electronically the status and validity of the license of each driver of a Mexican motor carrier commercial vehicle crossing the border;

(A) for every such vehicle carrying a placardable quantity of hazardous materials;

(B) whenever the inspection required in subsection (a)(5) is performed; and

(C) randomly for other Mexican motor carrier commercial vehicles, but in no case less than 50 percent of all other such commercial vehicles.

(4) gives a distinctive Department of Transportation number to each Mexican motor carrier operating beyond the commercial zone to assist inspectors in enforcing motor carrier safety regulations including hours-of-service rules under part 395 of title 49, Code of Federal Regulations;

(5) requires, with the exception of Mexican motor carriers that have been granted permanent operating authority for three consecutive years—

(A) inspections of all commercial vehicles of Mexican motor carriers authorized, or seeking authority to operate beyond United States municipalities and commercial zones on the United States-Mexico border that do not display a valid Commercial Vehicle Safety Alliance inspection decal, by certified inspectors in accordance with the requirements for a Level I Inspection under the criteria of the North American Standard

Inspection (as defined in section 350.105 of title 49, Code of Federal Regulations), including examination of the driver, vehicle exterior and vehicle under-carriage;

(B) a Commercial Vehicle Safety Alliance decal to be affixed to each such commercial vehicle upon completion of the inspection required by clause (A) or a re-inspection if the vehicle has met the criteria for the Level I inspection; and

(C) that any such decal, when affixed, expire at the end of a period of not more than 90 days, but nothing in this paragraph shall be construed to preclude the Administration from requiring reinspection of a vehicle bearing a valid inspection decal or from requiring that such a decal be removed when a certified Federal or State inspector determines that such a vehicle has a safety violation subsequent to the inspection for which the decal was granted.

(6) requires State inspectors who detect violations of Federal motor carrier safety laws or regulations to enforce them or notify Federal authorities of such violations;

(7)(A) equips all United States-Mexico commercial border crossings with scales suitable for enforcement action; equips 5 of the 10 such crossings that have the highest volume of commercial vehicle traffic with weigh-in-motion (WIM) systems; ensures that the remaining 5 such border crossings are equipped within 12 months; requires inspectors to verify the weight of each Mexican motor carrier commercial vehicle entering the United States at said WIM equipped high volume border crossings; and

(B) initiates a study to determine which other crossings should also be equipped with weigh-in-motion systems;

(8) the Federal Motor Carrier Safety Administration has implemented a policy to ensure that no Mexican motor carrier will be granted authority to operate beyond United States municipalities and commercial zones on the United States- Mexico border unless that carrier provides proof of valid insurance with an insurance company licensed in the United States;

(9) requires commercial vehicles operated by a Mexican motor carrier to enter the United States only at commercial border crossings where and when a certified motor carrier safety inspector is on duty and where adequate capacity exists to conduct a sufficient number of meaningful vehicle safety inspections and to accommodate vehicles placed out-of-service as a result of said inspections.

(10) publishes—

(A) interim final regulations under section 210(b) of the Motor Carrier Safety Improvement Act of 1999 (49 U.S.C. 31144 note) that establish minimum requirements for motor carriers, including foreign motor carriers, to ensure they are knowledgeable about Federal safety standards, that may include the administration of a proficiency examination;

(B) interim final regulations under section 31148 of title 49, United States Code, that implement measures to improve training and provide for the certification of motor carrier safety auditors;

(C) a policy under sections 218(a) and (b) of that Act (49 U.S.C. 31133 note) establishing standards for the determination of the appropriate number of Federal and State motor carrier inspectors for the United States-Mexico border;

(D) a policy under section 219(d) of that Act (49 U.S.C. 14901 note) that prohibits foreign motor carriers from leasing vehicles to another carrier to transport products to the United States while the lessor is subject to a suspension, restriction, or limitation on its right to operate in the United States; and

(E) a policy under section 219(a) of that Act (49 U.S.C. 14901 note) that prohibits foreign motor carriers from operating in the United States that is found to have operated illegally in the United States.

(b) No vehicles owned or leased by a Mexican motor carrier and carrying hazardous materials in a placardable quantity may be permitted to operate beyond a United States municipality or commercial zone until the United States has completed an agreement with the Government of Mexico which ensures that drivers of such vehicles carrying such placardable quantities of hazardous materials meet substantially the same requirements as United States drivers carrying such materials.

(c) No vehicles owned or leased by a Mexican motor carrier may be permitted to operate beyond United States municipalities and commercial zones under conditional or permanent operating authority granted by the Federal Motor Carrier Safety Administration until—

(1) the Department of Transportation Inspector General conducts a comprehensive review of border operations within 180 days of enactment to verify that—

(A) all new inspector positions funded under this Act have been filled and the inspectors have been fully trained;

(B) each inspector conducting on-site safety compliance reviews in Mexico consistent with the safety fitness evaluation procedures set forth in part 385 of title 49, Code of Federal Regulations, is fully trained as a safety specialist;

(C) the requirement of subparagraph (a)(2) has not been met by transferring experienced inspectors from other parts of the United States to the United States-Mexico border, undermining the level of inspection coverage and safety elsewhere in the United States;

(D) the Federal Motor Carrier Safety Administration has implemented a policy to ensure compliance with hours-of-service rules under part 395 of title 49, Code of Federal Regulations, by Mexican motor carriers seeking authority to operate beyond United States municipalities and commercial zones on the United States-Mexico border;

(E) the information infrastructure of the Mexican government is sufficiently accurate, accessible, and integrated with that of United States enforcement authorities to allow United States authorities to verify the status and validity of licenses, vehicle registrations, operating authority and insurance of Mexican motor carriers while operating in the United States, and that adequate telecommunications links exist at all United States-Mexico border crossings used by Mexican motor carrier commercial vehicles, and in all mobile enforcement units operating adjacent to the border, to ensure that licenses, vehicle registrations, operating authority and insurance information can be easily and quickly verified at border crossings or by mobile enforcement units;

(F) there is adequate capacity at each United States-Mexico border crossing used by Mexican motor carrier commercial vehicles to conduct a sufficient

number of meaningful vehicle safety inspections and to accommodate vehicles placed out-of-service as a result of said inspections;

(G) there is an accessible database containing sufficiently comprehensive data to allow safety monitoring of all Mexican motor carriers that apply for authority to operate commercial vehicles beyond United States municipalities and commercial zones on the United States-Mexico border and the drivers of those vehicles; and

(H) measures are in place to enable United States law enforcement authorities to ensure the effective enforcement and monitoring of license revocation and licensing procedures of Mexican motor carriers.

(2) The Secretary of Transportation certifies in writing in a manner addressing the Inspector General's findings in paragraphs (c)(1)(A) through (c)(1)(H) of this section that the opening of the border does not pose an unacceptable safety risk to the American public.

(d) The Department of Transportation Inspector General shall conduct another review using the criteria in (c)(1)(A) through (c)(1)(H) consistent with paragraph (c) of this section, 180 days after the first review is completed, and at least annually thereafter.

(e) For purposes of this section, the term "Mexican motor carrier" shall be defined as a Mexico-domiciled motor carrier operating beyond United States municipalities and commercial zones on the United States-Mexico border.

(f) In addition to amounts otherwise made available in this Act, to be derived from the Highway Trust Fund, there is hereby appropriated to the Federal Motor Carrier Safety Administration, $25,866,000 for the salary, expense, and capital costs associated with the requirements of this section.